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88-347

Supreme Court, U.S.
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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ERIN ANDREW CONN, *Petitioner,*

v.

JENNIFER ANN CONN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

APPENDIX

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[FILED JULY 15, 1988]

IN THE SUPREME COURT OF INDIANA

IN RE THE MARRIAGE OF: JENNIFER ANN CONN,	)	
Petitioner-Appellant,	)	No. 73S01-8807-CV-631 in the Supreme Court
v.	)	
ERIN ANDREW CONN,	)	No. 73A01-8806-CV-201 in the Court of Appeals
Respondent-Appellee.	)	

ORDER AFFIRMING THE COURT OF APPEALS

THE COURT, having granted Appellee's "Petition for Transfer and Expedited Appeal," now adopts the opinion of Judge Neal written on behalf of the unanimous First District of the Court of Appeals and affirms its judgment. Appellate Rule 11(B)(3), Ind. Rules of Procedure.

DONE AT INDIANAPOLIS, INDIANA this 15th day of July, 1988.

ROGER O. DEBRULER
Acting Chief Justice

SHEPARD, C.J., and DeBRULER, GIVAN, and DICKSON, JJ., concur.

PIVARNIK, J., dissents with opinion.

[FILED JULY 15, 1988]

IN THE SUPREME COURT OF INDIANA

JENNIFER ANN CONN,	)	
	)	
Petitioner-Appellant,	)	No. 73S01-8807-CV-631
	)	in the Supreme Court
v.	)	
	)	No. 73A01-8806-CV-201
ERIN ANDREW CONN,	)	in the Court of Appeals
	)	
Respondent-Appellee.	)	

APPEAL FROM SHELBY CIRCUIT COURT
The Honorable Robert T. Thopy, Judge Pro Tempore
Cause No. 73C01-8806-DR-127

PIVARNIK, J., Dissenting

I respectfully dissent from the position taken by the majority in this case. The majority has granted transfer from the Court of Appeals and summarily affirmed. The legal effect of this pursuant to our rules is to adopt the Court of Appeals opinion as our own. By doing so, this court has taken a position I perceive to be more social than legal, and sets a standard in our society I cannot endorse. With fullest regard and respect for my colleagues on this court and the Court of Appeals, I recognize the ultimate decision on issues such as this rests with the United States Supreme Court, and we as judges are bound under the law to recognize the judgments of that honorable court and to find it to be the law even though we might personally disagree with it for whatever reason. Judge Neal, speaking for a unanimous court, very judiciously acknowledged this when he stated:

> Although the moral concepts of abortion, as well as the assumption by the Supreme Court of the right to establish social policy, a function ordinarily reserved to legislative bodies, are troublesome to some members of this court, such personal reservations are irrelevant to the opinion here. Our duty consists only of applying the law as announced by the Supreme Court.

I agree with Judge Neal's conclusion. However, I also believe this court as the highest judicial tribunal of this State is not without responsibility to face the issues presented by our citizens and respond to them in a judicial manner. It is my view the fact situation in this case takes the issue beyond the holdings in *Roe v. Wade*, 410 U.S. 164, 93 S.Ct. 705, 35 L.Ed.2d 147, and *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788, relief on by the majority. As I will demonstrate, the facts in this case take this issue to its very ultimate position by holding that Jennifer Conn had an absolute and constitutional right to destroy a life created by her and her husband in marriage, for any reason or, in fact, for no reason, and that no one, including the husband, has a right to even *inquire* into her motives or into the wisdom or advisability of such action. The opinion this court hands down today holds that Erin Conn has no right under any facts to veto Jennifer's decision and the trial court is ordered to dismiss all proceedings related to the abortion issue. This finality seems to infer it is unthinkable for a court to even consider this issue or leave it of record.

The trial court here did not enter a permanent injunction ordering Jennifer Conn to carry this child to term. Neither was it suggested the husband has an unfettered veto power over his wife's desire to abort the fetus. The court found both parties have some rights in making this decision and enjoined the wife from aborting the fetus until the parties could be heard and a judicial determination made. This was done when there was plenty of time left in the first trimester. In *Danforth*, the United States Supreme Court found there is a balancing of rights between the parties and further said that because the wife is the one who bears the child and, between the two, is

more directly and immediately affected by the pregnancy, the balance weighs in her favor. The question remains whether a majority of that court intended to foreclose the issue to the extent it meant to say in every case, under any facts and circumstances, the husband may not even inquire into the wife's decision to take this step, and cannot bring it into court to be decided as all other issues in our society, including those rights and responsibilities in marriage relationships, are decided. As the majority opinion points out in *Roe v. Wade*, (1973), 410 U.S. ___, 93 S.Ct. 705, 35 L.E.2d 147, the Supreme Court declared state statutes proscribing abortions in the first trimester unconstitutional. In regard to the first trimester, it found:

> A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the due process clause of the Fourteenth Amendment. (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

In *Danforth*, the Supreme Court faced an issue challenging the constitutionality of a provision in a Missouri statute which required the consent of a husband before a woman could obtain an abortion during the first twelve weeks of the pregnancy. The court stated the issue:

> In *Roe* and *Doe* we specifically reserve [*sic*] decision on the question whether a requirement for consent by the father of the fetus, by the spouse, or by the parents, or a parent, of an unmarried minor, may be constitutionally imposed. 410 US at 165, n. 67, 93 S.Ct. at 733. We now hold that the state may not constitutionally require the consent of the spouse as is specified under section 3(3) of the Missouri Act, as a condition for abortion during the first twelve weeks of pregnancy.

The thrust of the *Danforth* majority was that the effect of Section 3(3) of the Missouri Act gave the husband a veto power

exercisable for any reason whatever or no reason at all. Clearly the court said a state statute cannot stand that gives the husband the absolute power to foreclose the conflict by withholding his approval. In fact, as argued in the briefs, the wife and her doctor could not finalize the decision without first having the husband's consent even if the husband's whereabouts were unknown and obtaining consent impossible. The court then stated:

> We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. *Cf. Roe v. Wade*, 410 U.S. at 153, 35 L.Ed.2d 147, 93 S.Ct. 705.

Is this language so conclusive it contemplates a wife will have an absolute veto power over any objections or considerations raised by the husband? Justices Stewart and Powell wrote a separate concurring opinion covering several issues in the case, and with reference to this issue stated:

> As to the provision of the law that requires a husband's consent to an abortion, § 3(3), the primary issue that it raises is whether the State may constitutionally recognize and give effect to a right on his part to participate in the decision to abort a jointly conceived child. This seems to me a rather more difficult problem than the Court acknowledges. Previous decisions have recognized that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom. See *Stanley v. Illinois*, 405 U.S. 645; *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535. But the Court has recognized as well that the constitution protects "a *woman's* decision whether or not to terminate her pregnancy." *Roe v. Wade*, *supra*, at 153, (emphasis added). In assessing the constitutional validity of § 3(3) we are called upon to

> choose between these competing rights. I agree with the Court that since "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy . . . the balance weighs in her favor." Ante, at 71.

Justice White wrote a dissenting opinion joined in by Chief Justice Berger and Justice Rehnquist. In his dissent in regard to the issue before us, Justice White provided:

> *Roe v. Wade*, *supra*, at 163, holds that until a fetus becomes viable, the interest of the State in the life or potential life it represents is outweighed by the interest of the mother in choosing "whether or not to terminate her pregnancy." 410 U.S., at 153. Section 3(3) of the Act provides that a married woman may not obtain an abortion without her husband's consent. The Court strikes down this statute in one sentence. It says that "since the State cannot . . . proscribe abortion . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion . . . ." Ante, at 69, 49 L.Ed.2d 805. But the State is not — under § 3(3) — delegating to the husband the power to vindicate the *State's* interest in the future life of the fetus. It is instead recognizing that the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife. It by no means follows, from the fact that the mother's interest in deciding "whether or not to terminate her pregnancy" outweighs the *State's* interest in the potential life of the fetus, that the husband's interest is also outweighed and may not be protected by the State. A father's interest in having a child — perhaps his only child — may be unmatched by any other interest in his life. See *Stanley v. Illinois*, 405 U.S. 645, 651, (1972), and cases there cited. It is truly surprising the majority finds in the United States Constitution, as it must be in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to [let] it mature into a live child. Such a rule cannot be found there, nor can it be found in *Roe v. Wade*, supra. These are matters which a State should be able to decide

> free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.
>
> In describing the nature of a mother's interest in terminating a pregnancy, the Court in *Roe v. Wade* mentioned only the post-birth burdens of rearing a child, 410 U.S., at 153, and rejected a rule based on her interest in controlling her own body during pregnancy. *Id.*, at 154, Missouri has a law which prevents a woman from putting a child up for adoption over her husband's objection, Mo Rev Stat § 453.030 (1969). This law represents a judgment by the State that the mother's interest in avoiding the burdens of child rearing do not outweigh or snuff out the father's interest in participating in bringing up his own child. That law is plainly valid, but no more so than § 3(3) of the Act now before us, resting as it does on precisely the same judgment.

The trial judge concluded in his findings that this issue was a viable one for a trial court to consider, as Justice White has indicated in his dissent, recognizing that the balance weighs in the wife's favor in considering the issue. He even stated he considered there to be a presumption the wife had the better of the argument and the husband would need to overcome that presumption. The *Danforth* majority indicated when a woman "with the approval of her physician but without the approval of her husband" makes a decision to terminate her pregnancy the competing interest of the parties is presented. The majority does not even require or contemplate that a physician will be involved in the wife's decision. There was no representation here the wife had even consulted a physician in making her decision. In fact, she refused under a claim of right of privacy to give any reason for her desore [*sic*] for an abortion other than to state she wanted one. Erin Conn, testified Jennifer told him unless he agreed to an adoption of the child once born, she would abort, and if there was any chance of his getting custody of the child once born, she would have an abortion. She did not tell her husband she needed an abortion for medical, emotional, or psychological reasons. There are other conflicts between these parties, as might be expected, and the trial court in

entering the temporary injunction, indicated the issues the court would weigh in determining whether a permanent injunction should ultimately issue. Those issues were:

> (a) whether the Wife has consulted with a physician, and if so, is he or she in agreement with Wife's decision to abort,
>
> (b) the likelihood of the child being born with grave mental or physical defects,
>
> (c) should Wife be ordered not to have an abortion whether she would likely suffer any harm — medical, emotional, psychological, or otherwise,
>
> (d) whether the continuation of the pregnancy and childbirth will likely interfere with Wife's education, employment, or employment opportunities,
>
> (e) whether an abortion will likely cause any harm to Husband, either emotionally, psychologically, or otherwise,
>
> (f) whether Wife is sincere in her desire for an abortion, and whether Husband is sincere in his desire that Wife not terminate the pregnancy,
>
> (g) whether the Wife will properly care for herself during the pregnancy,
>
> (h) how the expenses associated with prenatal care and delivery of the child will be paid,
>
> (i) whether the pregnancy, followed by the birth of a child, will cause financial hardship on either Husband or Wife, or their respective families,
>
> (j) whether the Husband is capable of fathering another child, and
>
> (k) whether the Husband is likely to be capable, and willing, to rear the child upon birth.

We are not faced here with a state statute that mandates the determination of every case by giving absolute veto power to one party over the decision of the other regardless of the facts and circumstances. This cases arises from the attempt of a trial

judge to make a decision involving one of the issues presented in a dissolution case in which he has full jurisdiction over all issues arising from and involved in the marriage relationship of these two people. It falls on him to hear the facts and apply the law to make a distribution of the parties' property and to provide for the care, custody, and support of the minor children. In so doing he can place the custody of the child with either party, and provide for support money and visitation to be adjusted with the other. Upon a proper finding, he can take the child from both the parties and place it with an appropriate agency, terminating their parental rights forever, and provide for the child's adoption to unknown persons to care for it. He must provide for any unborn child conceived during the marriage. The law presumes the husband to be the father of the wife's conception; that presumption can be overcome, if at all, by a showing of total non-access or total impotency. A finding that the wife conceives, even in the first trimester, fixes a responsibility on the husband to care for that child in the same manner he cares for those already born and in existence at the time of the dissolution of the marriage. It is incomprehensible to me this same trial court is foreclosed from even considering the question of whether the wife should be permitted to destroy this creation of both parties in the marital relationship merely because she wants to. At least up to now, no right has been determined to be absolute. Every right must yield and respond to rights of others and to the stability of society, in the marriage relationship and all others. In making his determinations in the dissolution action the trial court has a right to hear facts and determine whether one of the parties has committed adultery, uses drugs, uses alcohol excessively, or is in any way unstable in the management of his home and his life.

Counsel for Jennifer Conn cautions, or perhaps threatens, us that should we find this question to be a viable one to be decided by our courts, it would cause married women to simply withhold the fact of pregnancy from their husbands and take from them the opportunity to discuss the issue. This is a social, not a legal proposition, that has no place in this action. Further, it tends to polarize the parties and places them in opposite

camps, in conflict with each other. This is not only lacking in legal principle but it is in conflict with all moral, philosophical, and religious considerations of our society that have been discussed at length in decisions cited herein. I cannot but believe that one of the tenets of this society is that a marriage is a union between a man and a woman that is not characterized by polarization but represents the highest ideal and institution of unity and cooperation. Marriage forms the basic unit of the structure of our society, and indeed all civilized societies in the history of the world. Opinions of courts of all levels and of all jurisdictions as well as enactments of legislatures throughout the history of this nation, to the extent that this opinion would be heavily burdened to cite them all, have recognized the sanctity of the marriage union and the importance of preserving it. The position taken by the majority would be counter to that preservation and I cannot endorse it. I dissent.

[FILED JULY 15, 1988]

IN THE SUPREME COURT OF INDIANA

IN RE THE MARRIAGE OF: JENNIFER ANN CONN,	)	
Petitioner-Appellant,	)	No. 73S01-8807-CV-631 in the Supreme Court
v.	)	
ERIN ANDREW CONN,	)	No. 73A01-8806-CV-201 in the Court of Appeals
Respondent-Appellee.	)	

ORDER

GRANTING PETITION FOR TRANSFER

THE COURT now grants Appellee's "Petition for Transfer and Expedited Appeal."

DONE AT INDIANAPOLIS, INDIANA this 15th day of July, 1988.

ROGER DEBRULER
Acting Chief Justice for the Court

SHEPARD, C.J., and GIVAN, PIVARNIK, and DICKSON, JJ., concur.

DeBRULER, J., dissents to the granting of transfer.

[FILED JULY 15, 1988]

IN THE SUPREME COURT OF INDIANA

IN RE THE MARRIAGE OF: JENNIFER ANN CONN,	)	
Petitioner-Appellant,	)	No. 73S01-8807-CV-631 in the Supreme Court
v.	)	
ERIN ANDREW CONN,	)	No. 73A01-8806-CV-201 in the Court of Appeals
Respondent-Appellee.	)	

ORDER

REGARDING MOTION FOR STAY

With respect to Appellee's Motion for Stay, we recognize that the judgment of this Court is subject to review by the Supreme Court of the United States. In order to maintain the status quo so as to preserve this right, the trial court is ordered to vacate its temporary injunction effective 4:30 p.m. Friday, July 22, 1988.

DONE AT INDIANAPOLIS, INDIANA this 15th day of July, 1988.

ROGER O. DEBRULER
Acting Chief Justice for the Court

SHEPARD, C.J., and GIVAN and DICKSON, JJ., concur.

DeBRULER, J., dissents and votes to order temporary injunction vacated immediately.

PIVARNIK, J., dissents and votes to continue the temporary injunction.

[LIST OF COUNSEL OMITTED] [FILED JULY 12, 1988]

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

JENNIFER ANN CONN,	)	
	)	
Petitioner-Appellant	)	
	)	
-v-	)	No. 73A01-8806-CV-201
	)	
ERIN ANDREW CONN,	)	
	)	
Respondent-Appellee	)	

APPEAL FROM THE SHELBY CIRCUIT COURT
The Honorable Robert T. Thopy, Judge Pro-Tem
Cause No. 73C01-8806-CR-127

NEAL, J.

STATEMENT OF THE CASE

Petitioner-appellant, Jennifer Ann Conn (Jennifer), has perfected an interlocutory appeal from an order entered by the Shelby Circuit Court granting a temporary injunction in favor of her husband, Erin Andrew Conn (Erin), enjoining her from obtaining an abortion.

We reverse.

STATEMENT OF THE FACTS

Jennifer, age 19, is married to Erin, but there is pending in the Shelby Circuit Court a petition for dissolution of marriage filed by Jennifer. At the time of the entry of the temporary

injunction on June 27, 1988, Jennifer was approximately six weeks pregnant and was preparing to have an abortion. Erin filed a petition for injunction in the dissolution proceedings seeking to prevent Jennifer from obtaining the abortion. The trial court, after an evidentiary hearing, granted a temporary injunction, but at the same time certified the order for an interlocutory appeal under Ind. Rules of Procedure, Appellate Rule 4(B)(6). The trial court made special findings of fact upon which it entered conclusions of law. In its conclusions of law the trial court stated the reasons for its action as follows:

> A husband who has fathered the fetus being carried by his wife has rights in the fetus grounded in Indiana Common Law and in the 14th and 9th amendments to the United States Constitution. Those rights, in the face of his wife's desire for an abortion, must be balanced against the wife's constitutional rights to an abortion.

Record at 89.

ISSUES

Jennifer presents three issues on appeal, but because of our decision on Issue I, which is fundamental in nature, we need not address Issues II and III. Issue I is as follows:

> I. Whether the court's order enjoining Jennifer from obtaining an abortion violates her federal and state constitutional rights.

We hold that it does.

DISCUSSION AND DECISION

Dispositive of this case are the decisions of the Supreme Court of the United States in *Roe v. Wade* (1973), 410 U.S. 113, 93 S.Ct. 705, 35 L.E.2d 147, and *Planned Parenthood of Central Missouri v. Danforth* (1976), 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788. These cases, as well as others cited, contain exhaustive discussions of the legal, moral, medical, historical, psychiatric, ethical, and religious aspects of abortion. We see no point in repeating those discourses here, but the reader is

referred to those cases for further edification if he so desires. We will confine our discussions to the legal holdings stated therein.

In *Roe v. Wade* the Supreme Court declared state statutes proscribing abortions in the first trimester unconstitutional. It concluded as follows:

> A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
>
> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the other.

410 U.S. at 164-65, 93 S.Ct. 732, 35 L.Ed.2d at 183-84.

Danforth involved a suit challenging the constitutionality of a provision in a Missouri statute which required spousal consent before a woman could obtain an abortion during the first twelve weeks of pregnancy. In striking down the provision as being unconstitutional, the court stated:

> In *Roe* and *Doe* we specifically reserved decision on the question whether a requirement for consent by the father of the fetus, by the spouse, or by the parents, or a parent, of an unmarried minor, may be constitutionally imposed.

410 U.S., at 165 n. 67, 93 S.Ct., at 733. We now hold that the State may not constitutionally require the consent of the spouse, as is specified under § 3(3) of the Missouri Act, as a condition for abortion during the first 12 weeks of pregnancy. We thus agree with the dissenting judge in the present case, and with the courts whose decisions are cited above, that the State cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." 392 F.Supp., at 1375. Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.

We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 386, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965); *Maynard v. Hill*, 125 U.S. 190, 211, 8 S.Ct. 723, 729, 31 L.Ed. 654 (1888).[10] Moreover, we recognize that the decision whether to undergo or to forego an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious. Notwithstanding these factors, we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself

[10] We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. *Griswold v. Connecticut*, 381 U.S., at 486, 85 S.Ct., at 1682.

lacks that right. See *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349 (1972).[11]

It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the "interest of the state in protecting the mutuality of decisions vital to the marriage relationship." 392 F.Supp., at 1370.

We recognize, of course that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. *Cf. Roe v. Wade*, 410 U.S., at 153, 93 S.Ct., at 726.

The dissenting opinion of our Brother WHITE appears to overlook the implications of this statement upon the

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[11] As the Court recognized in *Eisenstadt v. Baird*, "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S., at 453, 92 S.Ct., at 1038 (emphasis in original).

> issue whether § 3(3) is constitutional. This section does much more than insure that the husband participate in the decision whether his wife should have an abortion. The State, instead, has determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it irrespective of the condition of their marriage. The State, accordingly, has granted him the right to prevent unilaterally, and for whatever reason, the decision to terminate her pregnancy. This state determination not only may discourage the consultation that might normally be expected to precede a major decision affecting the marital couple but also, and more importantly, the State has interposed an absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference.

428 U.S. at 69-71, 96 S.Ct. at 2841-42, 49 L.Ed.2d 804-06.

Indiana has no statute proscribing abortion in the first trimester, nor does it have a statute requiring spousal consent. No case decided subsequent to *Danforth* is cited by Erin which requires spousal consent before a wife may obtain an abortion. Instead, Erin's arguments are philosophical and moral in nature. His primary argument is that a trial court may resort to a case by case balancing of the rights of a husband to procreate and have children against the right of a wife to have an abortion. In support of that argument, he points to evidence contained in the record which demonstrates that he would be a responsible father who is capable of and would adequately support the child. He also cites cases which hold that a husband has fundamental rights to procreate and rights in children that have been born and are living. He claims that those fundamental rights involve unborn children as well as children born and living. Finally, he claims that the holding in *Danforth* does not preclude this court from resorting to a balancing test of the competing rights of the husband and wife. In that argument he attempts to distinguish *Danforth*.

Erin does not contend that *Roe* and *Danforth* have been overruled, distinguished, or modified by subsequent Supreme Court decisions. Quite to the contrary, the Supreme Court in

Thornburgh v. American College of Obstetricians and Gynecologists (1986), 476 U.S. 747, 759, 106 S.Ct. 2169, 2178, 90 L.Ed.2d 779, 792, stated:

> Again today we affirm the general principles laid down in *Roe* and *Akron*.

In addition, the decisions in *Roe* and *Danforth* have been mentioned uncritically in the following Indiana cases: *Razo v. State* (1982), Ind. App., 431 N.E.2d 550; *Indiana Hospital Licensing Council v. Women's Pavilion of South Bend, Inc.* (1981), Ind. App., 420 N.E.2d 1301; *Unwed Father v. Unwed Mother* (1978), 177 Ind. App. 237, 379 N.E.2d 467.

The authorities cited and argued by Erin are either not on point or antedate *Roe* and *Danforth*. Although the philosophical, moral, ethical, and religious controversy surrounding abortion remains, the legal issues which govern the facts of this case have been, at least for the present, set to rest by those decisions and their progeny. The language and holding in *Danforth* is unambiguous and unqualified. A married woman has an unconditioned right to have an abortion in the first trimester. She is not required to seek and obtain the consent of her husband. Erin's interpretation of *Roe* and *Danforth* is strained. *Danforth* in plain language struck down the balancing argument presented here, and even used the term "for any reason" in holding that a husband has no right to veto the wife's decision to have an abortion. We need not present citation of authority to demonstrate that if a state legislature lacks the power to delegate to a husband the right to veto his wife's decision to obtain an abortion by direct statutory enactment, then certainly a court under the guise of some nebulous common law concept, cannot exceed the power denied the legislature and grant the husband the right.

Erin's argument amounts to an invitation to us to distinguish, modify, or diminish the clear holdings in those cases. Such action on our part would be presumptous and without the scope of our privilege. Although the moral concepts of abortion, as well as the assumption by the Supreme Court of the

right to establish social policy, a function ordinarily reserved to legislative bodies, are troublesome to some members of this court, such personal reservations are irrelevant to the opinion here. Our duty consists only of applying the law as announced by the Supreme Court.

Pursuant to the express holding in *Danforth*, we hold that Erin has no right to veto Jennifer's decision to obtain an abortion as such decision concerns only her. Thus, the trial court erred in granting the temporary injunction.

For the above reasons this cause is reversed and the trial court is ordered to vacate the temporary injunction. Inasmuch as we have held that Erin has no right under any facts of this case to veto Jennifer's decision to obtain an abortion, the trial court is further ordered to dismiss all proceedings related to the abortion issue.

Judgment reversed.

RATLIFF, C.J. and ROBERTSON, J. CONCUR.

[FILED JUNE 27, 1988]

STATE OF INDIANA	)	IN THE SHELBY
	) SS:	CIRCUIT COURT
COUNTY OF SHELBY	)	CAUSE NO.
		73C01-8806-DR-127

IN RE THE MARRIAGE OF:	)
	)
JENNIFER ANN CONN	)
and	)
ERIN ANDREW CONN	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Findings of Fact

Upon the issues raised by Husband's application for preliminary injunction, the Court, having heard the evidence and being duly advised, now makes the following findings of fact:

1. Jennifer Ann Conn, hereinafter referred to as "Wife," is a married, white female, age 19, residing in Shelby County, Indiana, with her father.

2. Erin Andrew Conn, hereinafter referred to as "Husband," is a married, white male, age 23, residing in Elkhart County, Indiana. Husband moved to Elkhart County in late May, 1988. In order to save money he is currently sharing living quarters with the manager of the store where he is employed.

3. Husband and Wife are married. Wife filed her petition for dissolution of marriage in the morning of June 17, 1988, and Husband filed his petition for temporary restraining order and injunction in the afternoon of the same date.

4. The Wife did not testify regarding her reasons for desiring an abortion, nor did she testify to any harm that may befall her should Husband's application for preliminary injunction be

granted. Wife's only testimony was that she is pregnant and wants an abortion.

5. The Wife is presently not in school and Husband is unaware of any plans of Wife to pursue further education.

6. The Wife is not employed.

7. The Husband has obtained a high school diploma.

8. The Husband is approximately 7 courses short of a bachelor's degree in mathematics.

9. The Husband is a second lieutenant in the United States Army Reserves.

10. The Husband is employed as an assistant store manager for Kaybee Toys and Games, a retail chain store, and has been so employed for approximately 8 months.

11. Husband previously worked for the Ball State University campus police for 3-1/2 years.

12. Husband previously worked at a Village Pantry convenience store in Muncie for a year before going on 4 months' active military duty.

13. Husband's father is employed outside the home.

14. Husband's mother is employed outside the home.

15. Husband's father is an E-5 in the Naval Reserves.

16. Husband's parents have been married 27 years.

17. Husband's older brother Tod is a married student and is in the Army National Guard.

18. Husband's brother Mike is a musician in the Army Band at Fort Benjamin Harrison.

19. The Husband earns from his regular employ $318 per week, plus a small bonus based on the profitability of the store, and further earns $200 per month from the Army Reserves.

20. The Husband anticipates attending Kaybee's six week management training school within the next few months. Upon

entering such management training, Husband anticipates receiving a raise in salary to approximately $350.00 per week. Upon concluding such training, the Husband will be eligible for a position as manager of a store. As a store manager, Husband anticipates that his salary will be in the range of $350 to $450 per week.

21. Husband's job will likely require him to make two moves out of state within the next few months.

22. The Husband and the Wife have been married for 14 months, and have an existing minor child, Crystal Rose Conn, who is 5 months old.

23. Wife's current pregnancy was unplanned. The parties were familiar with various techniques of contraception in April and May of 1988, and were employing one such technique at the time of conception.

24. The parties had previously discussed and agreed to attempt conception in August, 1988.

25. The wife's last menstrual cycle was in the first week of May, 1988. Therefore, the Wife is approximately 6 weeks pregnant computed from the end of her last menstrual cycle.

26. On June 16, Wife told Husband that she was pregnant. The same day Husband viewed papers showing Wife's positive pregnancy test results, and other papers containing instructions on what a woman should bring the day of her abortion. The same day Wife asked if Husband's insurance would pay for an abortion.

27. When told by Wife of the pregnancy, Husband denied, in a moment of anger, that he was the father.

28. When told by Wife of her desire for a divorce Husband threatened suicide. He said he would take the biggest gun he could find and kill himself. During his upset, he cried and crawled on the floor on his hands and knees. Also, while Husband was riding in a car with Wife driving, he jumped back and forth several times between the front seat and back, and banged his head against the ceiling of the car.

29. Upon leaving the home of Wife on June 16, after hearing of her desire for an abortion, Husband went directly to the office of his Rushville attorney, John Worth, arriving between 10:00 A.M. and 11:00 A.M. June 16. His petition was filed seeking the temporary restraining order the following afternoon.

30. Prior to the filing of his petition seeking a restraining order and an injunction preventing the abortion, Husband had not discussed with Wife his desire that she not seek an abortion.

31. During the discussion between the parties on June 16, Wife told Husband they could not financially afford another child. She also said that unless Husband agreed to an adoption of the child once born, she would abort. She also said if there was any chance of Husband getting custody of the child once born, she would have an abortion.

32. The Wife has had no prior abortions.

33. Husband wants Wife to bear and give birth to the unborn child she is carrying so that he can raise, nurture the child, and give the child everything he has.

34. If the Wife has an abortion, Husband said he will feel a very big loss, and he compared the loss to the cutting off of his own arms and legs.

35. Husband has insurance to pay Wife's prenatal care expenses, as well as the medical and hospital expenses associated with the birth of the baby.

36. Husband feels financially secure and capable of raising the child to be born of this pregnancy. He said he would not need his Wife to provide financial support for the child.

37. Wife did not tell her Husband that she needed the abortion for medical, emotional, or psychological reasons. Husband is aware of no unusual risks facing his Wife if she carries the pregnancy to full term. Husband is unaware of any family reasons requiring the abortion.

Conclusions of Law

Having found the facts to be as recited above, the Court now makes the following conclusions of law:

38. This Court has jurisdiction to hear this cause.

39. The Husband has standing to seek injunctive relief in his Wife's action for dissolution of marriage.

40. The parties' status as husband and wife establishes a presumption that Husband is the father of any child due to be born during the marriage or within 300 days after the marriage is terminated by death, annulment or dissolution. Ind. Code § 31-6-6.1-9(a).

41. Under Indiana law, fathers have legal rights in their children, including the right to have custody, to care for their children, raise and nurture them.

42. There is no Indiana statute, nor decision by an Indiana court of appellate jurisdiction, which address the matters raised by the Husband's request for preliminary injunction. The United States Supreme Court has not addressed the issue. The decision of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), struck down a Texas statute which interfered with a woman's exercise of her 14th Amendment privacy right to have an abortion during the first or second trimester of pregnancy. The United States Supreme Court decision in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976), declared unconstitutional a Missouri statute which gave husbands unilateral veto power over any woman's decision to have an abortion. Neither *Roe* nor *Danforth* addressed the question of whether or not a husband's interests in continuing the pregnancy need be recognized and balanced against a wife's decision to have an abortion.

43. A husband who has fathered the fetus being carried by his wife has rights in the fetus grounded in Indiana common law and in the 14th and 9th Amendments to the United States Constitution. Those rights, in the face of his wife's desire for an abortion, must be balanced against the wife's constitutional rights to an abortion.

44. The balancing of those rights of the Husband with the right of the Wife to obtain an abortion is an entirely appropriate judicial function where such rights are asserted.

45. If the Wife is not enjoined from obtaining an abortion, the Husband will suffer a grave loss — the loss of a potential opportunity to raise, nurture, and enjoy the companionship of the child likely to be born as a result of this pregnancy.

46. The purpose of a preliminary injunction is to preserve the status quo pending ajudication of a case on its merits. In consideration of the following factors, the Court grants Husband's application for a preliminary injunction:

(a) Husband's remedies at law are inadequate thus causing irreparable harm pending resolution of the issues raised by his request for a permanent injunction if his application is not granted,

(b) Husband has demonstrated at least a reasonable likelihood of success at the hearing on the request for permanent injunction by establishing a prima facie case; in other words, the Husband has presented sufficient credible evidence on the factors to be weighed by this Court which are identified at paragraph 47 below.

(c) The threatened injury to Husband outweighs the threatened harm that the granting of this preliminary injunction may inflict upon Wife, and

(d) the public interest will not be disserved by the grant of a preliminary injunction.

47. Following the trial yet to be held on Husband's request for a permanent injunction, and in determining whether a permanent injunction should ultimately issue in this case, this Court will weigh the following factors in making its decision:

(a) whether the Wife has consulted with a physician, and if so, is he or she in agreement with Wife's decision to abort,

(b) the likelihood of the child being born with grave mental or physical defects,

(c) should Wife be ordered not to have abortion whether she would likely suffer any harm — medical, emotional, psychological, or otherwise,

(d) whether the continuation of the pregnancy and childbirth will likely interfere with Wife's education, employment, or employment opportunities,

(e) whether an abortion will likely cause any harm to Husband, either emotionally, psychologically, or otherwise,

(f) whether Wife is sincere in her desire for an abortion, and whether Husband is sincere in his desire that Wife not terminate the pregnancy,

(g) whether the Wife will properly care for herself during the pregnancy,

(h) how the expenses associated with prenatal care and delivery of the child will be paid,

(i) whether the pregnancy, followed by birth of a child, will cause financial hardship on either Husband or Wife, or their respective families,

(j) whether the Husband is capable of fathering another child, and

(k) whether the Husband is likely to be capable, and willing, to rear the child upon birth.

48. In ultimately deciding the question of whether Husband's request for a permanent injunction should be granted, and because of the greater physical and emotional burden on Wife of pregnancy and childbirth, this Court will recognize a presumption that Wife is entitled to an abortion, and will require Husband to overcome that presumption by the "clear and convincing evidence" standard.

ORDER

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Court hereby Orders that:

(a) the Wife, during the pendency of this action and until further order of this Court, is hereby enjoined from having an abortion to terminate her pregnancy;

(b) the Wife is ordered to provide a copy of this Court's Order to any physician, abortion clinic, abortion facility, or pregnancy counseling organization, or any employee thereof, which she might consult regarding the termination of her pregnancy;

(c) any physician, abortion clinic, abortion facility, or pregnancy counseling organization, or employee thereof, with notice of this Order, is hereby enjoined from performing an abortion on the Wife during the pendency of this action;

(d) nothing in this Order shall prohibit the termination of the Wife's pregnancy in a medical emergency in a circumstance which precludes prior resort to this Court;

(e) the Husband is ordered to pay for all reasonable and necessary medical expenses for the Wife related to prenatal care during the pendency of this action;

(f) the final hearing in this matter on Husband's request for a permanent injunction shall be promptly scheduled by the Court following consultation with counsel for the parties;

(g) the parties shall promptly notify the Court of the spontaneous abortion, or an induced abortion under paragraph (d) of this order,

(h) this Court certifies, pursuant to Rule 4(B)(6), Rules of Appellate Procedure, that

(1) Wife will suffer substantial injury if this order is erroneous and the determination that it is erroneous is withheld until after judgment, and

(2) This order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case.

ORDERED and decreed this 27th day of June, 1988, at 2:10 o'clock P.M.

ROBERT T. THOPY
Judge Pro Tempore
Shelby Circuit Court

IN THE SUPREME COURT OF INDIANA

IN RE THE MARRIAGE OF:	)
JENNIFER ANN CONN,	)
	)
Petitioner-Appellant,	) No. 73S01-8807-CV-631
	) in the Supreme Court
v.	)
	) No. 73A01-8806-CV-201
ERIN ANDREW CONN,	) in the Court of Appeals
	)
Respondent-Appellee.	)

FINAL DECREE

[The final decree in this case consists of the following:

1. The order of the Indiana Supreme Court adopting the opinion of the Indiana Court of Appeals and affirming its judgment. See p. 1a, *supra*.

2. The judgment of the Indiana Court of Appeals:

> For the above reasons this cause is reversed and the trial court is ordered to vacate the temporary injunction. Inasmuch as we have held that Erin has no right under any facts of this case to veto Jennifer's decision to obtain an abortion, the trial court is further ordered to dismiss all proceedings related to the abortion issue.
>
> Judgment reversed.

See p. 20a, *supra*.

3. The Final Docket Entry of the Shelby Circuit Court dismissing the action. See p. 30a, *infra*.]

STATE OF INDIANA	)	IN THE SHELBY CIRCUIT
	)	COURT
	) SS:	
COUNTY OF SHELBY	)	CAUSE NO.
	)	73C01-8806-DR-127

IN RE THE MARRIAGE OF:)
)
JENNIFER ANN CONN)
and)
ERIN ANDREW CONN)

FINAL DOCKET ENTRY

[Judge Charles D. O'Connor has caused the following entry to be made on the Docket of the Shelby Circuit Court:]

July 22, 1988

Pursuant to the Order of the Indiana Supreme Court dated July 12, 1988, this Court now dissolves the preliminary injunction entered herein on June 27, 1988, and Orders that all matters pertaining to issue of abortion be, and they are hereby, dismissed effective 4:30 P.M.

[FILED JULY 18, 1988]

IN THE SUPREME COURT OF INDIANA

JENNIFER ANN CONN,	)	
	)	
Appellant,	)	
	)	
-v-	)	CAUSE NO. 73S01-8807-CV-631
	)	
ERIN ANDREW CONN,	)	
	)	
Appellee.	)	

ORDER DENYING "PETITION FOR REHEARING".

THIS COURT, having heretofore entered an Order affirming an opinion of the Court of Appeals, involving a first trimester pregnancy, now hereby DENIES Appellee's Petition for Rehearing.

DONE AT INDIANAPOLIS, INDIANA this 18th day of July, 1988.

RANDALL T. SHEPARD
Chief Justice of Indiana

All Justices concur, except Pivarnik, J., who votes to grant the Petition for Rehearing; and Givan, J., who is not participating.

[FILED JULY 18, 1988]

IN THE

INDIANA SUPREME COURT

NO. 73S01-8807-CV-631

JENNIFER ANN CONN,	)	
	)	
Appellant,	)	Appeal From
	)	Indiana Court of Appeals
v.	)	First District
	)	No. 73A01-8806-CV-201
	)	
ERIN ANDREW CONN,	)	
	)	
Appellee.	)	
	)	

PETITON FOR REHEARING

Petitioner-appellee, Erin Andrew Conn, by counsel, pursuant to Indiana Rules of Appellate Procedure, Rule 11(A), petitions this Court to rehear the above-captioned case and to affirm the Shelby Circuit Court. In support of this Petition, Erin Conn states:

1. This Court has decided this cause of action adversely to Erin Conn in an order, filed July 15, 1988, adopting the written opinion of the Court of Appeals.

2. The opinion of this Court is in error for the reason that it held, in effect, that the Indiana constitutional provision establishing the Indiana judicial system, Ind. Constitution Art. I, § 12, Art. VII, §§ 1, 8, and Indiana statutes establishing the powers and jurisdiction of Indiana circuit courts, I.C. § 33-4-2-1 (circuit courts "shall have power to issue and direct all processes . . . necessary to the regular execution of the law), I.C. § 33-4-2-3 (circuit "courts shall have power to

make . . . injunctions"), I.C. § 33-4-6-1 (establishing the Shelby Circuit as a court of general jurisdiction, including equitable powers, excluding jurisdiction over juvenile matters only), would be unconstitutional as applied, under the United States Constitution, if applied to allow injunctions prohibiting abortions on a balancing of parental rights, due to the holding of the United States Supreme Court in *Planned Parenthood of Central Missouri v. Danforth* (1976), 426 U.S. 52. *Danforth* does not prohibit the balancing of the rights of a husband in his unborn child with the right of his wife to abort their child, and enjoining her from aborting where, on the facts of the particular case, his rights and interests outweigh hers.

3. The opinion of this Court is erroneous for holding that *Danforth* controls, because *Danforth* held that a husband has no absolute veto or consent right over the abortion decision of his wife and mother of his unborn child. This Court held "that Erin has no right to veto Jennifer's decision to obtain an abortion . . . . " A veto or consent is not what the Husband sought, nor is it what the Shelby Circuit Court granted to him. Rather, the Husband has requested a judicial balancing of his rights and interests with those of his wife in this context. That is what the Shelby Circuit Court did at the hearing on the preliminary injunction. This Court missed the point of the holding of the circuit court by its erroneous focus on a spousal veto.

4. The opinion of this Court is also erroneous for failing to recognize the Due Process and Equal Protection rights of the Husband, under the Fourteenth Amendment of the United States Constitution, to a balancing of his rights and interests in his child with the right and interests of his Wife to abort the child based upon a correct standard of proof.

5. The opinion of this Court is erroneous for the further reason that it failed to reverse the incorrect standard imposed on Erin Conn in the balancing employed by the Shelby Circuit Court, from which Erin Conn has cross-appealed. The trial court imposed on the Husband a presumption favoring his Wife and a "clear and convincing evidence" burden of proof. The holding of the Circuit Court and this Court on this issue was erroneous and violative of the Due Process and Equal Protec-

tion rights of Erin Conn under the Fourteenth Amendment to the United States Constitution.

WHEREFORE, the undersigned respectfully requests this Court to rehear this cause, pursuant to the Indiana Rules of Procedure, Appellate Rule 11(A), and promptly affirm the Shelby Circuit Court, with the exception of the erroneous presumption and burden of proof from which Husband has cross-appealed.

Respectfully submitted,

BRAMES, McCORMICK, BOPP & ABEL

JAMES BOPP, JR.
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IN THE

INDIANA SUPREME COURT

NO. 73A01-8806-CV-201

JENNIFER ANN CONN,	)	
	)	
Appellant,	)	Appeal From
	)	Indiana Court of Appeals
v.	)	First District
	)	No. 73A01-8806-CV-201
	)	
ERIN ANDREW CONN,	)	
	)	
Appellee.	)	
	)	

PETITION FOR TRANSFER AND EXPEDITED APPEAL

Petitioner-appellee, Erin Andrew Conn, by counsel, pursuant to Indiana Rules of Appellate Procedure, Rule 11(B), petitions this Court to transfer and take jurisdiction of this appeal and to vacate the judgment of the Indiana Court of Appeals, which vacated a preliminary injunction granted by the Shelby Circuit Court. In support of this appeal, Erin Conn states:

1. The Court of Appeals has decided this cause of action adversely to Erin Conn in a written opinion filed on the 12th day of July, 1988.

2. No petition for rehearing has been filed with the Court of Appeals. Petitioner appeals directly to this Court, pursuant to Appellate Rule 11(B), without petitioning for rehearing, due to the emergency nature of this appeal.

3. On June 24, 1988, a hearing was conducted before the Shelby Circuit Court to determine whether the rights and

interests of Erin Andrew Conn, the Husband, in his unborn children outweighed the right and interests of Jennifer Conn, his Wife, in aborting their unborn child.

4. On Monday, June 27, 1988, the Circuit Court issued Findings of Fact, Conclusions of Law, and its Order, preliminary enjoining the Wife from obtaining an abortion. This order is appealable under Appellate Rule 4(B)(3). The Circuit Court also certified, under Appellate Rule 4(B)(6)(a) and (b), that its Order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case, and that Jennifer Conn will suffer substantial injury if the order is erroneous and not corrected before final judgment.

5. The opinion of the Court of Appeals is in error for the reason that it held, in effect, that the Indiana constitutional provision establishing the Indiana judicial system, Ind. Constitution Art. I § 12, Art. VII, §§ 1, 8, and Indiana statutes establishing the powers and jurisdiction of Indiana circuit courts, I.C. § 33-4-2-1 (circuit courts "shall have power to issue and direct all processes . . . necessary to the regular execution of the law), I.C. § 33-4-2-3 (circuit "courts shall have power to make . . . injunctions"), I.C. § 33-4-6-1 (establishing the Shelby Circuit as a court of general jurisdiction, including equitable powers, excluding jurisdiction over juvenile matters only), would be unconstitutional as applied, under the United States Constitution, if applied to allow injunctions prohibiting abortions on a balancing of parental rights theory, due to the holding of the United States Supreme Court in *Planned Parenthood of Central Missouri v. Danforth* (1976), 428 U.S. 52. *Danforth* does not prohibit the balancing of the rights of a father and husband in his unborn child with the right of his wife, mother of their unborn child, to abort their unborn child, and enjoining her from aborting where, on the facts of the particular case, his rights and interests outweigh hers.

6. The opinion of the Court of Appeals is erroneous for holding that *Danforth* governs because *Danforth* held that a husband has no veto or consent right over the abortion decision of his wife and mother of his unborn child. The Court of Appeals

held "that Erin has no right to veto Jennifer's decision to obtain an abortion . . . .". A veto or consent is not what the Husband sought, nor is it what the Shelby Circuit Court granted to him. Rather, the Husband has requested a judicial balancing of his rights and interests with those of his wife in this context. That is what the Shelby Circuit Court did at the hearing on the preliminary injunction. The Court of Appeals missed the point of the holding of the circuit court by its erroneous focus on a spousal veto.

7. The opinion of the Court of Appeals is also erroneous for failing to recognize the Due Process and Equal Protection rights of the Husband, under the Fourteenth Amendment of the United States Constitution, to a balancing of his rights and interests in his child with the right and interests of his Wife to abort the child based upon a correct standard of proof.

8. The opinion of the Court of Appeals is erroneous for further reason that it failed to reverse the incorrect standard imposed on Erin Conn in the balancing employed by the Shelby Circuit Court, from which Erin Conn has cross-appealed. The trial court imposed on the Husband a presumption favoring his Wife and a "clear and convincing evidence" burden of proof. The holding of the Circuit and Appellate Courts on this issue was erroneous and violative of the Due Process and Equal Protection rights of Erin Conn under the Fourteenth Amendment to the United States Constitution.

9. This appeal involves the rights of a Husband and father to the care, custody, control, and companionship of his unborn child, his right to procreate, and his rights in his family relations, which rights are substantial and of constitutional dimension.

10. The precise issue before the Court regarding the father's rights has not been determined by either the United States Supreme Court or this Court and, therefore, involves a substantial question of law of great public importance.

11. The Husband, Erin Conn, is married to Jennifer Conn, his Wife. The Husband is a white male, age 23, is a second

lieutenant in the United States Reserves, is approximately 7 courses short of a bachelor's degree in mathematics, is an assistant manager of a retail chain store, has insurance to pay for his wife's prenatal and childbirth expenses, and wants his Wife to carry the unborn child to term so he can raise, nurture, and provide for the child.

12. The Husband has testified that he would suffer a profound loss if his child were aborted.

13. The Husband has testified that he feels capable of raising and providing for the child alone, if necessary, which he desires to do.

14. Husband and Wife had previously discussed conception and agreed to attempt it in August, 1988.

15. The Wife is a white female, age 19, and filed for dissolution of marriage on June 17, 1988, on which day Husband also filed for a temporary restraining order preventing her abortion, following which this preliminary injunction was issued.

16. Wife gave no reasons for her desire for an abortion at the hearing on the preliminary injunction. Husband is aware of no medical, psychological, family, education, or employment reasons why his Wife would desire an abortion.

17. On June 16, 1988, Wife told husband they could not financially afford another child. She further warned Husband that she would abort unless he agreed to put the unborn child up for adoption upon its birth. The trial court also found that the Wife said that she would abort if there was any chance of the Husband receiving custody of the child at birth.

18. The Shelby Circuit Court found on June 27, 1988, that the Wife was approximately 6 weeks pregnant, calculated from the end of her last menstrual cycle.

19. Due to the nature of this case, a speedy determination of the issues raised in this appeal is desirable.

WHEREFORE, the undersigned respectfully requests this Court to transfer this appeal from the Indiana Court of

Appeals to the Indiana Supreme Court, pursuant to the Indiana Rules of Procedure, Appellate Rule 11(B), and promptly reverse the order of the Court of Appeals and affirm the order of the Shelby Circuit Court, with the exception of the erroneous presumption and burden of proof from which Husband cross-appealled in the court below. The undersigned also requests that this Court grant the accompanying motion for a Stay of the Order of the Court of Appeals.

Respectfully submitted,

BRAMES, McCORMICK, BOPP & ABEL

JAMES BOPP, JR.
RICHARD E. COLESON

Attorneys for Erin Conn

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STATUTES INVOLVED

Ind. Const. art. I, § 12

All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

Ind. Const. art VII, § 1

The judicial power of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish.

Ind. Const. art. VII, § 8

The Circuit Courts shall have such civil and criminal jurisdiction as may be prescribed by law.

Ind. Code § 33-4-2-1 Process of courts

Sec. 1. They shall have power to issue and direct all processes, to courts of inferior jurisdiction, and to corporations and individuals which shall be necessary to the regular execution of the law.

Ind. Code § 33-4-2-2 Form of Process

Sec. 2. Where there shall be occasion for any process for which no form is prescribed by law, such court shall frame a new writ in conformity with the principles thereof.

Ind. Code § 33-4-2-3 Judgments; sentences; orders and injunctions

Sec. 3. Such courts shall have power to make all proper judgments, sentences, decrees, orders and injunctions, and to issue all processes, and to do such other acts as may be proper to carry into effect the same, in conformity with the constitution and laws of this state.

Ind. Code § 33-4-6-2 Jurisdiction of court

Sec. 2. The Shelby Circuit Court shall have and exercise concurrent, coordinate and coextensive jurisdiction with the Shelby Superior Court in all civil actions and proceedings, at law or in equity; in divorce and special statutory proceedings and actions; probate matters and proceedings; actions by and against administrators, executors, guardians, trustees, and other fiduciaries and personal representatives, including but not limited to will contests, actions to resist probate of wills, and claims against estates; and in criminal proceedings, actions and matters.

Ind. Code § 31-1-11.5 DISSOLUTION OF MARRIAGE

31-1-11.5-1 Purposes; rules of construction

Sec. 1. Purposes; Rules of Construction. (a) This chapter shall be construed and applied to promote its underlying purposes and policies.

b. The underlying purposes and policies of this chapter are:

***

(2) to provide for the appropriate procedures for the dissolution of marriage;

(3) to provide for the disposition of property, child support and child custody;

***

Ind. Code § 31-1-11.5-2 Definitions

Sec. 2. Definitions. When used in this chapter:

(a) The term "court" shall mean the circuit, superior or other courts of this state upon which jurisdiction to enter divorce decrees or dissolution decrees has been or may be conferred.

(b) The term "dissolution decree" means a judicial decree entered in a proceeding for the dissolution of marriage which has the effect of terminating the marriage and restoring the

parties to the state of unmarried persons and which may include those matters set out in section 9 of this chapter.

(c) The term "child" means a child or children of both parties to the marriage and includes children born out of wedlock to such parties as well as children born or adopted during the marriage of such parties.

Ind. Code § 31-1-11.5-7 Provisional orders

***

(d) The court may issue an order for temporary maintenance or support in such amounts and on such terms as may seem just and proper and may issue a temporary restraining order, a custody order or an order for possession of property to the extent it deems proper.